



Atlanta Calgary Chicago Houston London New York Singapore

December 31, 2010

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

RE: *Provisions Common to Registered Entities - Proposed Amendments to Part 40 of
the Commission's Regulations*
RIN: 3038-AD07

Dear Mr. Stawick:

ICE Futures U.S., Inc. ("IFUS") and ICE Clear U.S., Inc. ("ICUS") (collectively, "ICE U.S.") appreciate the opportunity to comment on the Commodity Futures Trading Commission's ("CFTC" or "Commission") proposed amendments to Part 40 of the regulations under the Commodity Exchange Act, as amended ("Act"). IFUS, a wholly owned subsidiary of IntercontinentalExchange, Inc.¹ ("ICE"), is New York's original futures exchange tracing its history to 1870, when the New York Cotton Exchange was founded. Since 1974, when the Commodity Futures Trading Commission Act created the Commission, IFUS has been a board of trade and designated contract market ("DCM") and has been filing rules, rule amendments and the terms and conditions of listed and prospective contracts with the Commission in accordance with former Regulation 1.41 and Part 40 ("Submissions").

ICUS is a wholly owned subsidiary of IFUS and has been a clearing organization since 1915 when the New York Cotton Exchange Clearing Association, Inc. was incorporated. In accordance with the Commodity Futures Modernization Act of 2000, ICUS became a designated clearing organization ("DCO") and has been regularly filing Submissions as well.

Being an active member of the futures industry for more than 100 years, ICE U.S. has a knowledgeable perspective on the amendments to Part 40 proposed by the Commission (the "Proposal").

The Proposal, among other things, will require registered entities to submit with each Submission:

¹ ICE is also the parent company of the Chicago Climate Futures Exchange and The Clearing Corporation, which are registered entities under the Act and are subject to the filing requirements of Part 40.



- a certification that the Submission complies with the Act and Commission Regulations and the documentation relied on to support that view; and
- a statement verifying that a due diligence review of the legal conditions, including intellectual property rights, was conducted.

Certification and Documentation of Compliance with the Act and Commission Regulations

Since the adoption of Part 40, registered entities have been required to certify that their Submissions comply with the Act and Commission Regulations. The Proposal will now require, in addition to the certification, the filing of documents or information substantiating the certification. In this respect the Proposal goes beyond requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which only iterates the current requirement of a certification and not the filing of documentation substantiating the certification.

In justifying this aspect of the Proposal, the Commission states that it believes “a registered entity should conduct an appropriate due diligence review to support that assertion” and that “any such review should generate some form of documentation . . . substantiating the review, including information used and sources consulted . . .” (75 FR 67282, 67285 (November 2, 2010)) ICE U.S. certainly agrees that a registered entity should not certify that a Submission complies with the Act unless it has carefully considered the issue and satisfied itself that a certification can be made in good faith. The Commission has not indicated in its explanation of the proposed amendments that it has encountered instances where certifications suggest that the submitter had ignored considering the Act or had negligently filed certifications without regard for applicable law. Thus, it is not clear why the Commission would now require the filing of copies of all “documentation” that formed the basis for the certification. It would seem more useful to the Commission in reviewing a Submission to have a written explanation of the rules covered by the Submission rather than pages of reports, data and other “records” that were generated or consulted in connection with the submitter’s decision-making regarding the affected rules or amendments. In this regard, we are mindful of the finite resources of the Commission and the significant expansion of the Commission’s regulatory remit under the Act.

ICE U.S. suggests that, rather than requiring the filing of documentation, the Commission require registered entities to retain in their files the relevant information supporting their decisions. If the Commission is doubtful that the Submission is compliant or that the certification was made in good faith, it could then request the registered entity to produce the supporting records. If, however, the Commission rejects this proposal and, nevertheless, determines that documentation should accompany each



Submission, it should give specific guidance as to the types of documents it will require. For example, would a file memo giving essentially the same explanation as the registered entity provides in its Submission suffice, or would computer reports and copies of source documents be necessary? If the latter types of “records” were required, the filings could be voluminous and thereby unduly burden and delay the submitter while also potentially unnecessarily burdening the Commission staff.

Moreover, in many instances there would not be any specific “documentation” generated or even necessary. The most obvious case would be where an amendment reflecting requirements imposed by the Commission in a rulemaking is being implemented. In addition, it should be recognized that many rule amendments do not implicate specific standards under the Act. For example, rules changing trading hours do not implicate any provisions of the Act that lend themselves to a due diligence review or the “documentation” the Commission is suggesting be filed with the Submission. In many instances there is no documentation a registered entity could provide. For example, introducing an order type in the electronic trading context that was previously available only in the context of open outcry trading hardly lends itself to an analysis and creation of supporting documentation. Rather it would seem that nothing more than the explanation of the rule change that would be provided in the Submission should be necessary. In considering the foregoing, the Commission should keep in mind that it would still be receiving a certification of an exchange official regarding compliance with the standards of the Act and could request documentation at any time.

Statement of Due Diligence Review of Legal Conditions, Including Intellectual Property

The proposed statement of due diligence review of legal conditions is a new requirement, which the Commission explains is needed to ensure that registered entities have an adequate understanding of the legal conditions and constraints that may have a material impact on the trading of products that are based on underlying markets that are constructs of federal or state regulations or based on bona fide intellectual property rights. This proposal likewise exceeds the requirements contained in Dodd-Frank and, we believe, inappropriately injects the Commission into the commercial and business practices of registered entities. The Commission has not given any reason why it should now become the business and legal sounding board for each registered entity in the area of intellectual property and other legal conditions that do not arise under the Act.

New products take time and research to bring to market and are not the result of spurious decisions. There is no reason why tangential issues related to product development should require the imposition of special regulatory requirements by the Commission. If a new product does not reflect the commercial value or regulatory constraints inherent in the underlying commodity or instrument, or infringes on a third



party's intellectual property rights, then, as history has shown, the product either will not trade or will be unsuccessful.

In this regard, and again being mindful of the Commission's finite resources, we would also note the far reaching and nebulous nature of the various legal issues that could be implicated by this aspect of the Proposal, many of which fall far outside the Commission's core expertise. As an example, ICE has listed both swap and futures contracts that settle against the final settlement price of various NYMEX futures contracts. At the time of such listing, NYMEX did not offer a credible electronic trading market, and these product offerings were innovative and greatly benefited customers in the trading market. However, NYMEX dubiously claimed that its settlement prices were "copyrighted" under intellectual property law and could not be referenced in products traded on other exchanges or trading venues. After years of litigation, this contention was ultimately proved to be without merit, a position that was supported by the United States Copyright Office and affirmed by the United States Second Circuit Court of Appeals. We question whether the Commission would be properly positioned to make such complex determinations in reviewing Submissions, and whether its determination could bind the parties and preclude litigation of the type that occurred in this case. We therefore urge the Commission not to adopt this provision of the Proposal.

Conclusion

Except for the two amendments discussed herein, ICE U.S. is in agreement with the Commission's proposed amendments to Part 40. However, as stated above, we believe the Commission should reconsider adopting those amendments. In particular, ICE U.S. suggests that the maintenance of appropriate information by a registered entity to support the bona fides of a certification of rules and rule amendments is sufficient for the Commission's purposes and will avoid unnecessary burdens on registered entities. We also urge the Commission not to adopt the amendment that would otherwise require a statement of due diligence review as to the absence of certain legal conditions. We appreciate the opportunity to comment on this rulemaking.

If you have any questions, please contact the undersigned at 212.748.4084 or at jill.fassler@theice.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Jill S. Fassler", written in a cursive style.

Jill S. Fassler
Associate General Counsel
ICE Futures U.S.